

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAMES SHUKRY,

Defendant and Appellant.

C046256

(Sup.Ct.No. 02F10902)

Defendant Michael James Shukry appeals his convictions for second degree murder (Pen. Code, § 187, subd. (a))¹ and assault on a child with force likely to produce bodily injury (§ 273ab). He contends the court erred in not investigating whether jury misconduct had occurred, erred in denying disclosure of juror identifying information to allow him to investigate potential juror misconduct, and erred in admitting gruesome photographs into evidence. We affirm.

¹ Unless otherwise indicated, further statutory reference are to the Penal Code.

STATEMENT OF FACTS

On December 17, 2001, seven-year-old McImely Dearing fell off a fence and was admitted to the hospital with a head injury. Other than a scrape on his face, following his release from the hospital, McImely appeared fine. Defendant was the live-in boyfriend of McImely's mother, Carol Roberts.

On December 26, 2001, McImely was at the home of a neighbor, Gayle Linniger, playing with her children. Although he ate his dinner slowly, Linniger did not notice any signs that McImely was in pain or discomfort and she did not see any bruises on him.

On that same day, defendant had a dispute with his employer and quit his job.

Later that evening, defendant told Carol there was something wrong with McImely. Carol found McImely in his pajamas on the floor in his bedroom. She called 911.

Defendant initially told Carol he had heard a "bump" and went upstairs and found McImely on the floor. He noticed the boy was making a "snoring" sound which "wasn't right." Defendant also told the police this story initially.

William Porter, an emergency medical technician responded to the 911 call. He found McImely unconscious, with irregular breathing and a frothy sputum coming from his mouth.

The next day, defendant told Carol he had been spinning McImely around. A few days later, he told Carol and the police that while he was spinning McImely, McImely struck his head on

the couch. He said he did not reveal this detail earlier because he was scared.

When he was interviewed by the police on the morning of December 27, defendant had a scrape on his left arm, several scrapes and cuts on his chest and scrapes and cuts on his left hand.

McImely died at the hospital. An autopsy was performed by forensic pathologists, Doctors Stephany Fiore and Mark Super. They found the cause of McImely's death to be multiple blows to the head, causing subdural hemorrhaging and immediate unconsciousness. McImely was bruised "virtually from head to toe and on every surface of his body[.]" McImely had suffered 39 separate acute impacts to his body and was bruised from head to toe, including the penis and pubic area. Injuries on his hands and feet were consistent with defensive injuries. McImely also had an injury to his abdomen which resulted in a small bowel hemorrhage.

The doctors concluded the injuries would not be caused by a child's normal activities. Upon examination, Dr. Fiore found McImely had suffered a subdural hematoma and retinal bleeding. She also found a traumatic axonal injury which caused the brain to swell. To sustain these kinds of injuries, McImely had to have suffered a blow of significant force to his head. She also concluded he had not sustained a subdural hematoma as a result of the fall on December 17. The abdomen injury was also one which would not occur naturally or by accident, but rather could be caused only by a kick or a punch to the abdomen. Another

indication that the injuries were intentionally inflicted was the existence of an optic nerve sheath hemorrhage.

Dr. Angela Rosas also examined McImely. Based on the nature and extent of his injuries, she concluded he had suffered a severe physical assault, consistent with a beating with hands, feet and probably . His injuries from this beating led to his death.

PROCEDURAL BACKGROUND

Defendant was charged with murder (§ 187, subd. (a)) and assault on a child with force likely to produce bodily injury, resulting in death. (§ 273ab.) Following a jury trial, defendant was found guilty of both counts and sentenced to an aggregate term of 25 years to life.

DISCUSSION

I.

A. Claims of Juror Misconduct

Defendant contends the trial court erred in not investigating potential juror misconduct and by denying him access to juror identifying information. We disagree.

On December 15, 2003, before the day's deliberations had begun, Juror No. 7 informed the clerk of the court he wanted to speak with the judge. With both attorneys present, Juror No. 7 told the judge he had a problem with "the process that the foreman and one of the others are following[.]"

The juror reported he believed the jurors were using their notebooks and polling each other, that he had requested read-backs of certain testimony and they were not requested by the

jury, and that one of the other jurors was relying on their expertise in a particular field. The court advised the juror that the foreperson had a certain amount of discretion to conduct the deliberations, and that included not necessarily immediately requesting a read-back of testimony. The court also noted that the jurors had subsequently requested the read-back of testimony. Juror No. 7 acknowledged they had gotten the requested read-back, "[a]fter forcing it." The court also explained to the juror that while there were some admonitions about the use of juror notes, there was no rule against the jurors comparing their notes. The court also reassured the juror that jurors could compare notes, although they needed to be careful about the issue and explained jurors were not required to have the reporter read-back testimony.

Juror No. 7 also indicated that things were "constantly being suggested, . . . that are outside the evidence." He gave as an example of this in the context of the medical issues they were then deliberating, "And it's been offered up as an example -- this is just one of the things that comes up -- as some kind of martial arts move that did it, that couldn't leave a real mark or any one mark." He noted that was outside the jurors' experience.

The court advised the juror that while the jurors were not to consider or discuss facts as to which there was no evidence, "you don't leave your common sense behind you. You don't leave your personal experiences, what you've done on the outside, what your experiences are." The court also disagreed that that was

necessarily outside the jurors' experience, stating, "That's like saying it's outside your experience about talking how hard you can get hit by a prize fighter because you've never been in a ring. . . . That's wrong, you've seen it. You've watched it. [¶] Or you can't say what it's like to be in Ancient Greece because you were never there. You can argue about history. You can argue about your limited knowledge of science. You can talk about your personal experiences."

Juror No. 7 also indicated that one person had mentioned "something bout witnesses that weren't called" and that one juror was "offering up that as either an indicator of guilt or innocence whether witnesses were called or weren't called." The court advised that it was not "absolutely improper for the jurors to talk about what witnesses . . . weren't called, as long as you're not talking about a shift in the burden. [¶] Remember, the defense has no burden." After speaking with the attorneys, the court also informed the juror that the fact that the defendant did not testify was "not to be discussed in any way, shape or form. [¶] So that is -- that's a distinction to the fact that it is permissible in some circumstances -- even though it is not mandatory for either side to call as witnesses, it is permissible in some trials for the attorneys to comment on the failure to call a logical witness other than the defendant. And accordingly, it's permissible in some circumstances for jurors to talk about the failure of either side to call as a witness somebody who might reasonably be expected to come as a witness."

Defendant contends "a fair interpretation" of the discussion with Juror No. 7 "would lead one to believe that jury misconduct was occurring. Once such knowledge came before the court, it was obligated to conduct a hearing to determine whether or not such misconduct existed." Defendant argues once the court was placed on notice that jury misconduct might have occurred "it had a duty to conduct a reasonable inquiry into that behavior. . . . [T]he trial court erred by ignoring the statements of the juror suggesting misconduct and sending him back to deliberations with no further action other than an admonition that he not disclose anything to his fellow jurors."

"[T]he court [has] a duty to conduct reasonable inquiry into allegations of juror misconduct or incapacity--always keeping in mind that the decision whether (and how) to investigate rests within the sound discretion of the court. [Citations.]" (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) Once the court is on notice of possible juror misconduct, it must make "whatever inquiry is reasonably necessary." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743.) "But not every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. [Citation.] . . . [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would

constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.

[Citation.]' (*People v. Ray* (1996) 13 Cal.4th 313, 343.)"

(*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

We disagree with defendant that the court failed in this duty. The court spoke at length with Juror No. 7 and listened to his concerns about the deliberations. When necessary, the court elicited additional information from Juror No. 7 about what he specifically meant in his complaints. The court explained to Juror No. 7 why the particular issues he raised did not amount to misconduct by the other jurors. In fact, even if true the allegations made by Juror No. 7 would not have risen to the level of misconduct. As the juror himself indicated, his complaints were really with the procedure by which the jury was going about the deliberative process and that "it didn't seem very professional." Given the circumstances the court fulfilled its duty to conduct a reasonable inquiry into the matter and the court did not abuse its discretion.

B. Disclosure of Juror Personal Identifying Information

Related to the above argument, defendant also contends the court erred in denying his request for disclosure of the personal identifying information of the jurors.² We disagree.

Code of Civil Procedure sections 206 and 237 govern the release of juror identifying information. (*People v. Jefflo*

² The motion was made as part of a motion for new trial, which was also denied by the trial court.

(1998) 63 Cal.App.4th 1314, 1319 (*Jefflo*).) Section 206, subdivision (g) of the Code of Civil Procedure, states: "Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237."

Section 237, subdivision (b) of the Code of Civil Procedure, provides in pertinent part: "Any person may petition the court for access to [personal juror identifying information]. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. . . ."

Thus, a defendant is entitled to a full hearing to obtain juror identifying information only if he first presents a

petition that establishes good cause for the information. (Code Civ. Proc., §§ 206, 237; *Jefflo, supra*, 63 Cal.App.4th at pp. 1318-1323 & fn. 8.) To establish good cause, a defendant must set forth a sufficient showing to support a reasonable belief that juror misconduct occurred. (See *People v. Jones* (1998) 17 Cal.4th 279, 317; see also *Jefflo, supra*, at pp. 1321-1322, fn. 8.) We overturn the trial court's ruling on this issue only if it abused its discretion. (*People v. Jones, supra*, at p. 317.)

In support of his request for disclosure of the juror identifying information, defendant relied on the conversation between Juror No. 7 and the court. He declared the jury "using their own expertise and even ranking their expertise. . . is tantamount to going outside the record and reviewing medical books or other books related to whatever subject." He also claimed the juror indicated other jurors were talking about things outside the evidence and the jurors' experience, such as martial arts, and that the jurors did not read the "law." In denying the hearing on the motion, the court indicated that it was really the idea of jurors using their own expertise and going outside the record which was of concern.

The court reiterated its position that "there's nothing wrong with drawing from your life experiences" Defense counsel argued to do so was "like having additional experts inside the jury without ever having the opportunity to cross-examine them on their expertise and credibility." Relying on *People v. Rhodes* (1989) 212 Cal.App.3d 541, and *Jefflo, supra*,

the court found there had not "been a sufficient showing that this Court should or could make or entertain a reasonable belief of jury misconduct has occurred. . . . [¶] . . . [F]irst of all, the juror's concerns were satisfactorily addressed. And second of all, . . . none of the concerns which he stated as far as the rest of the jurors and how they were conducting their deliberations would give rise to any concern whatsoever that these jurors were engaging in misconduct."

As noted above, there was not a sufficient showing to support a reasonable belief that juror misconduct had occurred. Defendant argues out-of-court evidence was considered by the jury. Reading the entirety of the exchange, Juror No. 7 did not indicate that the jury received any evidence out of court. At most, he suggested there were conversations occurring in deliberations which drew on personal life experience or common knowledge. This is not misconduct.

Defendant argues another juror injected his own expertise into the deliberations. Viewing the entire context of that complaint, Juror No. 7 wanted a read-back of particular testimony. He was arguing to the jury that "each piece [of evidence] must be looked at carefully and evaluated as to whether it's good evidence or not good evidence, does it corroborate with other evidence. [¶] And on this certain point, another person whose expertise in their particular field, said there was no way that this should be looked at because of their experience. A mistake isn't going to be made in that particular field or area, and which was concurred by another

juror." Then, those two jurors apparently compared their credentials. Juror No. 7 told them, "[Y]our opinion is not evidence, it's an opinion." The read-back of testimony did happen. Accordingly, this was not a situation where a juror was bringing his or her outside expertise into the deliberative process as evidence. Furthermore, it did not impact on the deliberations because the read-back of testimony did, in fact, take place. Defendant did not demonstrate likely misconduct here.

Defendant next contends that there was misconduct in the jury commenting on the failure of defendant to testify. There is no evidence in the record that this occurred. In fact, the record suggests the contrary. Juror No. 7 stated that one person had mentioned "something about witnesses that weren't called" and that one juror was "offering up that as either an indicator of guilt or innocence whether witnesses were called or weren't called." The court made it clear in no uncertain terms to Juror No. 7 that it was absolutely improper for the jury to discuss the fact that defendant did not testify. It is clear from the entirety of the exchange that had the jurors been speaking of the defendant, Juror No. 7 would have told the court that. In addition, he specifically asked the court if there were any cases, *other than the defendant*, that the jurors could not discuss. Juror No. 7 would not have asked this question if the discussions had been about defendant not testifying.

There was no abuse of discretion in the trial court's denial of defendant's motion to release juror identifying

information, as defendant did not make a sufficient showing of juror misconduct.

II.

Defendant argues the court erred under Evidence Code section 352 by allowing particular autopsy photographs to be introduced into evidence. He contends these photographs were "exceedingly gruesome . . . [¶] and presented only for its [sic] shock value and prejudicial effect on the jury."

In an *in limine* motion,³ defendant challenged the introduction of a number of photographs. The admission of only two of these photographs is challenged on appeal. These two particular photographs depicted the victim's eyeballs and dissected retinas. In particular, the photographs depicted the optic nerves and the hemorrhaging along those nerves. In one of the photographs, the eyes remained in the child's skull and the picture was taken from inside the skull and in the other they had been removed from the skull and the eyes had been dissected.

The trial court conducted a hearing on the motion at which the prosecution explained the relevance of these photographs. The prosecutor argued the photographs demonstrated the "significant rotational injury and a specific type of force required to produce the hemorrhaging" seen in the photographs, that is that the "amount of force far beyond what you would

³ Defendant was not required to renew these objections at trial, as the parties agreed that the *in limine* ruling would be binding and preserve the issues for appeal. (*People v. Jennings* (1988) 46 Cal.3d 963, 975-976, fn. 3.)

expect in an accidental bump on the head situation." The photograph in which the eyes were removed from the victim's skull demonstrated the specific "placement and location of the retinal hemorrhaging within the eye" in a way that could not be seen otherwise. The specific location of the bleeding was again relevant to the manner in which the injury occurred. The nature of the injuries to the eyes was a significant factor in the doctors' determinations that the injuries were intentionally inflicted rather than the result of an accident. The testimony of Dr. Fiore bore out this relevance.

The court ruled that the issue of whether the injuries were the result of intentionally inflicted injuries or accidentally caused was "90% of what this case is about." The court continued, "I just think that it's a type of thing that sounds worse than it is when you look at these photographs. Hopefully, the jury is going to be able to pay attention without being overwhelmed with pity, compassion, prejudice, that type of thing, . . . [¶] . . . I'm going to allow the District Attorney to use the autopsy photographs"

"Under section 352, it is proper to admit relevant evidence when the probative value of that evidence is not substantially outweighed by its prejudicial effect. [Citation.] The trial court's decision is reviewed for abuse of discretion.

[Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 664.) The prosecution is not obligated to prove the details of its case solely through the testimony of live witnesses.

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1216.) Photographs

need not be excluded as cumulative if they are offered to prove facts established by testimony. (*San Nicolas, supra*, at p. 665.)

In this case, the photographs demonstrated that McImely's injuries were intentionally inflicted and not the result of an accidental bump on the head, as defendant claimed. Further, the photographs corroborated Dr. Fiore's testimony and opinion on how the injuries were caused. The trial court did not abuse its discretion in admitting these photographs. We find no error.

DISPOSITION

The judgment is affirmed.

MORRISON, Acting P.J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.